No. 95-962

(2)

Supreme Court, U.S.
FILED
JAN 18 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

CSX TRANSPORTATION, INC. and MONROE COUNTY, INDIANA,

Petitioners,

vs.

JANET FRITSCH, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION

NELS ACKERSON
Counsel of Record
LYNN A. BULAN
THE ACKERSON GROUP, CHARTERED
Attorneys for Respondents
1275 Pennsylvania Avenue
Suite 1100
Washington, D.C. 20004
(202) 628-1100

8129
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED

1. Whether, consistent with *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987), the Court of Appeals for the District of Columbia Circuit properly exercised jurisdiction to review a final ICC order in which the ICC expressly considered new evidence in ruling on a motion to reconsider.

2. Whether the ICC can reassert jurisdiction over an abandoned right-of-way, more than 180 days after issuing an abandonment order with a 180-day public use condition under 49 U.S.C. § 10906, and cause the respondent-landowners' land to be converted to a trail under the rails-to-trails provisions of 16 U.S.C. § 1247(d), even though the railroad company abandoned the line under ICC authority and railroad easements across the land were extinguished by operation of law.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	iii
Opinions Below	1
Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Denying the Writ	6
I. The Court of Appeals Properly Exercised Jurisdiction to Review the Agency Order Because the ICC Considered New Evidence in Issuing its Final Order.	6
II. No Conflict Exists Between Circuits Because Adequacy of Notice Is Not an Issue.	8
III. The Court of Appeals Decision, Which Correctly Holds that the ICC Exceeded its Jurisdiction in This Case by Attempting to Apply the Trails Act After Abandonment Was Consummated, Does Not Limit the Lawful Application Elsewhere of Either the Public Use Condition or the Railbanking Provisions of the Trails Act.	9
Conclusion	12

Contents

Page

TABLE OF CITATIONS

Cases Cited:

ICC v. Brotherhood of Locomotive Engineers, 482 U.S. 270 (1987) ..... i, 6, 7

Friends of the Sierra R.R., Inc. v. ICC, 881 F.2d 663 (9th Cir. 1989), *cert. denied sub nom. Tuolumne Park and Recreation Dist. v. ICC*, 493 U.S. 1093 (1990) 7, 8

Fritsch v. ICC, 59 F.3d 248 (D.C. Cir. 1995) 2

Hayfield Northern R.R. v. Chicago N.W. Transp. Co., 467 U.S. 622 (1984) 11

Platnick Brothers, Inc. v. Norfolk & Western Ry. Co., 367 I.C.C. 782 (1983) 7

Unpublished Agency Decisions Cited:

Illinois Central Gulf R.R. Co. - Abandonment - In DeWitt and Pratt Counties, IL, AB-43 (Sub.-No.134), served Jan. 4, 1989 11

Statutes Cited:

16 U.S.C. § 1247 ..... i, 1, 3

49 U.S.C. § 10906 ..... *passim*

Contents

Page

APPENDIX

Appendix A — Motion to Strike 1a

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 59 F.3d 248 (D.C. Cir. 1995), and is reproduced in Petitioners' Appendix at 1a-13a (hereinafter "Pet. App."). The final order of the Interstate Commerce Commission (hereinafter "ICC") that was the subject of the proceeding below was served by the ICC on March 22, 1994, and is reproduced in Pet. App. at 28a-36a.

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions set out in Petitioners' Brief at 2-3, this case also involves 16 U.S.C. § 1247(d) (hereinafter the "Trails Act"), which provides in relevant part:

> (d) Interim use of railroad rights-of-way
>
> . . . . Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.

STATEMENT OF THE CASE

CSX Transportation, Inc., (hereinafter "CSX") operated a rail line and had railroad right-of-way easements over land in Monroe County, Indiana that was and still is owned in fee simple by adjacent landowners, including Respondents herein.[1]

On January 25, 1993, CSX filed a Notice of Exemption with the ICC seeking authorization to abandon this line on March 19, 1993. Pet. App. at 3a. On February 1, 1993, Monroe County filed a request with the ICC for a public use condition, pursuant to 49 U.S.C. § 10906 (hereinafter "Section 10906").[2] Pet. App. at 3a. Section 10906 permits the ICC to impose a 180-day waiting period after abandonment during which the railroad may not dispose of abandoned properties that it owns which are suitable for public use unless the properties have first been offered for sale for public purposes. 49 U.S.C. § 10906.

On February 16, 1993, the ICC served a Notice of Exemption authorizing abandonment effective 30 days later. Pet. App. at 18a-19a.

---

1. Petitioner CSX, in its *Notice of Exemption*, stated that it was CSX's opinion that the properties proposed for abandonment might not be suitable for other public purposes due to the possibility of reversionary interests in the property. This representation as to CSX's lack of fee simple ownership in the property has not been challenged. "Petitioners are various private landowners who own in fee simple the land across which CSX Transportation, Inc. ("CSX") possessed an easement for rail purposes." *Fritsch v. ICC*, 59 F.3d 248, 249 (D.C. Cir. 1995), Pet. App. at 2a. If CSX actually owned the land in fee, CSX would be free to transfer its interest in the land to Monroe County, regardless of whether the Trails Act applies, and neither CSX nor Monroe County would have any reason to seek the aid of this Court.

2. The Monroe County Parks and Recreation Department, often referred to in papers and decisions as MCPRD, is a division of Monroe County.

On March 18, 1993, the ICC issued a decision allowing the abandonment, with a 180-day public use condition. Pet. App. at 41a-44a. The ICC denied Monroe County's request for interim trail use under 16 U.S.C. § 1247 because the railroad did not consent to the trail use as required by 16 U.S.C. § 1247. Pet. App. at 42a.

On March 23, 1993, and again on April 23, 1993, CSX informed the ICC that it had abandoned the rail line on March 19, 1993. Pet. App. at 4a. Tariffs were cancelled, and during the summer and fall of 1993, rails and ties were removed, hence terminating the railroad use on the land, extinguishing CSX's railroad right-of-way easement by operation of law and relieving the burden of the right-of-way easement from the owners of the fee simple estate. Pet. App. at 11a.

On September 10, 1993, Monroe County wrote to the ICC that CSX and Monroe County had reached an agreement for Monroe County to acquire a portion of the rail corridor for a cost of $90,000. No evidence was submitted that CSX at that time owned any interest in the land. Pet. App. at 4a-5a.

On September 14, 1993, the public use condition expired. On that day CSX filed a statement with the ICC affirming Monroe County's representations and requesting the ICC to reopen the abandonment proceeding to issue a Notice of Interim Trail Use (hereinafter "NITU") pursuant to the Trails Act, 16 U.S.C. § 1247(d). Pet. App. at 5a. Section 1247(d) only applies *before* abandonment and authorizes the ICC to issue a NITU to cause a line to be rail-banked and used for interim trail purposes as an alternative to abandonment. CSX again reaffirmed that it had abandoned the rail line on March 19, 1993. Pet. App. at 4a.

On September 23, 1993, the ICC reopened the proceeding and issued a NITU. Pet. App. 21a-24a.

On November 8, 1993, the Respondent-Landowners moved to reconsider the ICC's decision on the basis of new evidence, and Respondent-Landowners filed supplemental authority on December 8, 1993. Pet. App. at 37a-40a. As explained by the ICC in its subsequent ruling, the new evidence included a claim that "full abandonment had been consummated" and "no agreement was reached within the 180-day period . . ." Pet. App. at 32a.

On December 15, 1993, Monroe County filed a Motion to Strike "Supplemental Authority" Filed by "Class of Adjacent Landowners" and Notice of Status of Railbanked Facility (hereinafter "Motion to Strike and Status Report"), which contained *new evidence,* including claims that the line had not been abandoned and that Monroe County had in fact reached a trail agreement during the 180-day period, and also including a report on events and developments that had occurred after the ICC's September 27, 1993 decision. Respondents' Appendix at 1a-5a.

On March 22, 1994, the ICC issued a decision which, while reaffirming its earlier decision, effectively re-opened the proceeding by expressly considering the new evidence. Specifically, the ICC responded to Monroe County's Motion to Strike and Status Report: "In the interests of a more complete discussion of the issues raised in opposition, we will not strike the supplemental pleading but consider it in light of Monroe County's response to it." Pet. App. at 33a, n. 6. The ICC proceeded to consider Monroe County's new evidence:

> It asserts further that, during the course of the public use condition, CSXT and MCPRD negotiated a trail use and railbanking agreement and then timely requested the Commission to issue a NITU, an action for which, argues MCPRD, the Commission

> retained jurisdiction. In addition to its motion to strike, MCPRD included a report on the status of the railbanked facility. It stated that it had assumed management and other responsibilities for the corridor, that a railbanking agreement with CSX had been implemented under the NITU, and that MCPRD had received a grant of approximately $1 million from the Federal government . . . to construct a trail facility on the Monroe County portion of the corridor.

Pet. App. at 33a. After reviewing the new evidence and the earlier proceedings, the ICC ruled again that it had jurisdiction to issue a NITU. Pet. App. at 35a-36a.

On May 19, 1994, Respondent-Landowners filed a timely petition for review of this final agency order by the United States Court of Appeals for the District of Columbia Circuit (hereinafter "D.C. Circuit").

On May 11, 1995, the D.C. Circuit held that it possessed the jurisdiction to review the ICC's decision because the ICC had considered new evidence in connection with the motion for reconsideration. Pet. App. at 8a. The D.C. Circuit further held that the ICC was without power to undo the abandonment of the CSX line, that the abandonment had worked a reversion of interest to the fee simple, that the petition for review was allowed, and that the ICC's decision was reversed. Pet. App. at 13a. Petitions for reconsideration were denied. Pet. App. at 16a-17a.

On December 18, 1995, CSX and Monroe County filed their petition to this Court for a writ of certiorari. The ICC did not seek further review by this Court.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS PROPERLY EXERCISED JURISDICTION TO REVIEW THE AGENCY ORDER BECAUSE THE ICC CONSIDERED NEW EVIDENCE IN ISSUING ITS FINAL ORDER.

This Court set out the standard for judicial review of an agency decision in *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 278 (1987) (hereinafter *Locomotive Engineers*):

> When the Commission reopens a proceeding for any reason and, after reconsideration, issues a new and final order setting forth the rights and obligations of the parties, that order —even if it merely reaffirms the rights and obligations set forth in the original order — is reviewable on its merits . . . . Where, however, the Commission *refuses* to reopen a proceeding, what is reviewable is merely the lawfulness of the refusal.

(Citations omitted).

Respondent-Landowners in their November 8, 1993 and December 8, 1993 filings presented the ICC with new evidence. Monroe County, in its Motion to Strike and Status Report, presented new evidence of its own. The ICC explicitly declined to strike the Respondent-Landowners' Motion to Reconsider Decision and Notice of Interim Trail Use (hereinafter "Motion to Reconsider") and supplemental authority, and instead it expressly considered the new evidence that was submitted by both Respondent-Landowners' and Monroe County. The ICC's

written decision denying Respondent-Landowners' Motion to Reconsider explicitly acknowledges its consideration of the new evidence. Pet. App. at 8a.

This Court explained in *Locomotive Engineers* that if an agency in fact reconsiders a ruling, even if its new final order merely reaffirms the rights and obligations set forth in the original order, the new final order is reviewable on its merits. 482 U.S. at 278.

The argument of Petitioners here (Intervenors below) that there was no "new evidence" but only "newly raised evidence" completely ignores the evidence that Monroe County itself presented. Monroe County presented evidence of facts that occurred both before and after the ICC's September 27, 1993 order. "Newly raised evidence" is "precisely the same substance that could have been brought there by an appeal from an original order," and is therefore not reviewable. *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 279 (1987). Thus, evidence that was available at the time of the original proceeding is not "new evidence." *Friends of the Sierra R.R., Inc. v. ICC*, 881 F.2d 663, 667 (9th Cir. 1989), *cert. denied sub nom. Tuolumne Park and Recreation Dist. v. ICC*, 493 U.S. 1093 (1990). *See also Platnick Brothers, Inc. v. Norfolk & Western Railway Co.*, 367 I.C.C. 782, 785 (1983) ("in an administratively final case it is only fair that `new evidence' be in fact *new*.").

Monroe County's "new evidence" was *new*. The evidence presented to the ICC in connection with Respondent-Landowners' Motion to Reconsider and Supplemental Authority to Motion to Reconsider Decision and Notice of Interim Trail Use and Monroe County's Motion to Strike and Status Report is "new evidence" since the facts provided to the ICC concerned events that occurred after the ICC issued its original decision allowing the exemption. The ICC expressly declined to strike the "new

evidence" and acted upon it in its decision issued on March 22, 1994. Since the ICC accepted "new evidence" in connection with its March 22, 1994 order, the D.C. Circuit properly exercised jurisdiction to review that new final order.

II.

NO CONFLICT EXISTS BETWEEN CIRCUITS BECAUSE ADEQUACY OF NOTICE IS NOT AN ISSUE.

No issue whatsoever is presented by the nature or content of the *Federal Register* notice that was published in this case. Petitioners' focus on the *Federal Register* appears to be merely an effort to create the appearance of a conflict between circuits where none exists. Only if there had been no "new evidence" would there be any substance whatsoever to the farfetched contention that the D.C. Circuit's decision here somehow conflicts with the Ninth Circuit's decision in *Friends of the Sierra R.R., Inc. v. ICC*, 881 F.2d 663, 667 (9th Cir. 1989), *cert. denied sub nom. Tuolumne Park and Recreation Dist. v. ICC*, 493 U.S. 1093 (1990).[3]

---

3. Petitioners based their entire *Federal Register* argument on one phrase taken out of context from the D.C. Circuit's opinion, "[Landowner-Respondents] were unaware of the filing of the CSX motion." However, the D.C. Circuit did not hold that the lack of notice was the basis for reviewing the ICC decision of March 22, 1994. The D.C. Circuit considered the record in which the ICC itself acknowledged that it had considered new evidence and the D.C. Circuit explained:

> Not only did the Commission not reject [Respondent-Landowners'] assertions of new matter, it in fact addressed anew the merits of the September 23 determination as though accepting the facial validity of [Landowner-Respondents'] claims and rejected them only on the underlying merits.

Pet. App. at 8a.

Because the ICC considered new evidence and in fact re-opened the proceeding, determining the rights and obligations of the parties to the action, Respondent-Landowners' Motion To Reconsider was the subject of a new final agency decision. When the ICC ruled on that motion on March 22, 1994, Respondent-Landowners timely filed their appeal of that denial on May 19, 1994.

III.

THE COURT OF APPEALS DECISION, WHICH CORRECTLY HOLDS THAT THE ICC EXCEEDED ITS JURISDICTION IN THIS CASE BY ATTEMPTING TO APPLY THE TRAILS ACT AFTER ABANDONMENT WAS CONSUMMATED, DOES NOT LIMIT THE LAWFUL APPLICATION ELSEWHERE OF EITHER THE PUBLIC USE CONDITION OR THE RAILBANKING PROVISIONS OF THE TRAILS ACT.

The Court of Appeals decision here correctly defined the limits of the ICC's jurisdiction in this case. The Court of Appeals decision does not limit the application of the public use condition under Section 10906 of the Railroad Revitalization and Regulatory Reform Act of 1976. 49 U.S.C. § 10906. Neither does the Court of Appeals decision here limit the power of the ICC to facilitate railbanking and rails-to-trails conversions under the Trails Act.

The petition for a writ of certiorari here muddles the important differences between Section 10906 and the Trails Act. In the Trails Act, Congress provided a mechanism by which rails could be converted to trails. The Trails Act preempts state abandonment law because by federal law no abandonment is deemed to have occurred. Under the Trails Act, if *before abandonment* both the railroad and a responsible party agree to

negotiate a trail use, the ICC may issue a NITU and initiate a 180-day negotiation period to allow the railroad and would-be trail manager to come to an agreement concerning interim trail use. Through this process, a railroad right-of-way corridor may be converted to a trail, without triggering the extinguishment of railroad right-of-way easements and the consequent resumption of full dominion over the railroad corridor by the underlying landowners.

But this case did *not* proceed as a Trails Act case because, as acknowledged by the ICC and all of the parties, CSX expressly declined to participate in negotiations for such a conversion and as a result, by law, the ICC could not issue a NITU. Instead, the ICC authorized abandonment, with a public use condition. After CSX had taken all necessary steps to abandon the line and upon expiration of the public use condition, abandonment was consummated at the latest on September 14, 1994. Pet. App. at 21a, 28a, 42a. Therefore the Trails Act provisions thereafter simply could not and did not apply to this case.

The statute that *is* in issue here is Section 10906. The plain language of 10906 permits a public use condition to be effective only *after* ICC abandonment authorization. That provision does not prevent the consummation of abandonment and the consequent extinguishment of right-of-way easements by operation of law. Rather, it requires the railroad to make available for public purposes, under a procedure similar to a right of first refusal, whatever property the railroad retains that is suitable for public use. If easements are extinguished, of course, the railroad may have no land left to transfer.

The railroad right-of-way easements across Respondent-Landowners' land were extinguished upon abandonment, which occurred before the ICC's September 27 order. Thus, Respondent-Landowners' land was no longer available to CSX to

negotiate with Monroe County or anyone else. Additionally, the plain language of Section 10906 permits the ICC to impose a public use condition *"for a period not more than 180 days,"* which expired before the ICC attempted to resurrect its jurisdiction by imposing interim trail use under the Trails Act. With the expiration of the Section 10906 public use condition, the ICC's jurisdiction over the rail line expired, even if it had not expired with the earlier extinguishment of the easements. Therefore the ICC had no power to make orders concerning Respondent-Landowners' land.

ICC jurisdiction ordinarily ends with the issuance of a certificate of abandonment. *Hayfield Northern R.R. v. Chicago N.W. Transp. Co.*, 467 U.S. 622, 633 (1984). The ICC has described its test of consummation of abandonment:

> Our jurisdiction over a line typically ends when a line is fully abandoned. Whether a line is fully abandoned is a question of the carrier's intent. In determining intent, we look at certain indicia: a line is fully abandoned when a certificate of public convenience or necessity (or an exemption notice as pertinent) is issued and has become effective, tariffs have been cancelled and operations have ceased. Abandonment is considered consummated when a line is fully abandoned.

Illinois Central Gulf R.R. Co. - Abandonment - In DeWitt and Pratt Counties, IL, AB-43 (Sub.-No. 134), served Jan. 4, 1989. Clearly ICC jurisdiction ends with the consummation of abandonment. When the ICC places a public use condition on an abandonment, the ICC of course retains jurisdiction to enforce the opportunities for public entities to negotiate the purchase of

whatever property, if any, remains after abandonment. The ICC has no power to create new real property interests in the railroad.

The D.C. Circuit correctly held here that CSX had taken every step necessary to abandon, and in fact had acknowledged to the ICC on several occasions that it had abandoned the rail corridor on March 19, 1993. Abandonment was not "stayed" by the imposition of a public use condition under 49 U.S.C. § 10906. Upon abandonment, the right-of-way easements were extinguished, the Respondent-Landowners' land was no longer a part of the national transportation system, and the ICC's jurisdiction ended.

The D.C. Circuit's decision follows unmistakable and consistent precedents. There is no important legal issue for this Court to review.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

NELS ACKERSON
Counsel of Record
LYNN A. BULAN
THE ACKERSON GROUP, CHARTERED
1275 Pennsylvania Avenue, N.W.
Suite 1100
Washington, D.C. 20004
Phone: (202) 628-1100

APPENDIX A — MOTION TO STRIKE

BEFORE THE INTERSTATE COMMERCE COMMISSION

AB-55 (Sub-no. 455X)

CSX Transportation, Inc. — Exemption — Monroe and Lawrence Counties, Indiana

(1) Motion to Strike "Supplemental Authority" Filed by "Class of Adjacent Land Owners" and (2) Notice of Status of Railbanked Facility

Motion to Strike

On 13 December, counsel for Monroe County (used collectively to refer to Monroe County and its Parks and Recreation Department, a party in this proceeding) received a copy of a document entitled "Supplemental Authority to Motion to Reconsider Decision and Notice of Interim Trail Use or Abandonment." Monroe County moves to strike this "Supplemental Authority" for the reasons stated below.

1. The "Supplemental Authority" amounts to a reply to a reply, and is not permitted under 49 C.F.R. 1104.13(c) ("[a] reply to a reply is not permitted"). Indeed, the "supplemental" pleading amounts not just to a second bite at the apple, but apparently an even more illicit third.

Monroe County assumes that the "Class of Adjacent Property Owners" is comprised of the entities that filed unserved "letter-protests" dated in late September 1993. These protests were disallowed by this Commission, except as correspondence, for failure to comply with ICC procedural requirements. *See* decision in this docket served October 20.

Appendix A

The attorney (Mr. Watts) serving the "Supplemental Authority" at issue here then filed a "petition to reconsider" on November 4, 1993, on behalf of certain identified persons or companies. That petition, as Monroe County pointed out in its reply served November 9, provided absolutely no grounds to reconsider.

Mr. Watts' latest emission (the "Supplemental Authority"), which was received one month after our reply was served, amounts to nothing more than a third effort at the same subject. It purports to offer some rationale for the November 4 petition to reconsider, and to fill in the gaping hole Monroe pointed out on November 9. Mr. Watts' "Supplemental" volley is thus clearly a reply to a reply, and unquestionably is not permitted by the Commission's regulations.

Mr. Watts gives no basis for the delay, or rationale for permitting its filing in contravention of this Commission's regulation, nor could he. Mr. Watts' reply to our reply offers nothing new, either factual or legal. There are simply no grounds for his failure to comply with this Commission's regulations.

2. The "Supplemental Authority" fails to identify the persons on whose behalf it is filed. The title page and unnumbered final page of the pleading states that the signatory attorney represents "Class of Adjacent Property Owners" but those property owners are not identified, and this Commission has never approved, identified or certified any "class," let alone the class specified. Attorneys filing pleadings with the Commission should identify the persons on whose behalf they are filing, so that parties to a proceeding do not have to "assume," as we have had to do, the identity of our opposition.

3. In the event that this Commission entertains Mr. Watts' third bite at the apple in contravention of 49 C.F.R. 1104.13(c), Monroe County notes that Mr. Watts on behalf of his "Class" makes a number of legal and factual misstatements. For example, this Commission has consistently recognized that it retains jurisdiction over a corridor so long as a condition on an abandonment authorization remains extant, and even if salvage activities have been undertaken. The reason is that there is not "full consummation" of the abandonment authority so long as a condition is extant. Conversely, if salvage activities have not taken place, and the corridor is otherwise intact, the Commission has also consistently taken the position that it retains jurisdiction even if the abandonment was unconditioned or the conditions imposed have expired. The reason again is lack of "full consummation."

In the case at bar, a public use condition was timely requested and duly imposed by the ICC. During the interval provided by the public use condition, CSX Transportation and Monroe County negotiated a trail use and railbanking agreement for the portion of this corridor in Monroe County, and jointly requested that this Commission enter a railbanking order. Specifically, Monroe County advised the Commission of this situation in a letter dated September 10, filed September 14, within the time provided by the public use condition. This Commission has consistently taken the position that a timely request during the period of a condition continues the Commission's jurisdiction for a period sufficient to act upon the request, even if the Commission's action is a short time outside the period of the initial condition, as here. *Compare Burlington Northern Railroad Company — Exemption — Fall River and Custer Counties, SD*, AB-6

(Sub-no. 293X), served Jan. 4, 1989 (lifting a condition barring salvage and disposal effective Feb. 3, 1989) *with* same, served Feb. 9, 1989 (issuing a NITU in response to a request by State of South Dakota "dated" January 27, 1989 — six day interval between lifting condition and imposition of section 8(d) order, although order timely requested).

As CSX Transportation's conduct here shows, the railroad during the course of a public use condition negotiated an agreement keeping the Monroe County portion of the corridor intact, which is what a public use condition is supposed to facilitate. The parties timely requested ICC to issue a NITU, in accordance with the Commission's now ancient policy of doing so "as long as we retain jurisdiction to do so." *Burlington Northern, supra,* served Feb. 9, 1989, at p. 1. The situation is controlled by cases such as *Burlington Northern.*

Illinois Central Gulf — Abandonment — De Witt and Piatt Counties, Ill., 5 ICC2d 1054 (1988), cited by Mr. Watts, is inapposite. That corridor had been authorized for abandonment, the abandonment was effective, the line had been salvaged, and there were no conditions, let alone extant conditions. Here there were conditions, the conditions were extant, and the parties actually completed an agreement while the conditions were extant.

Status of Railbanked Facility

Monroe County is pleased to report (a) that it has assumed management responsibility and other responsibilities for the corridor in question in accordance with 16 U.S.C. 1247(d), (b) that a railbanking agreement with CSX has been implemented pursuant to the NITU, and (c) that the County has received a

substantial (approximately $1 million) grant from the federal government's Intermodal Surface Transportation Efficiency Act's "enhancements program" to construct a trail facility on the Monroe County portion of the corridor.

Respectfully submitted,

s/ Charles H. Montange
Charles H. Montange
426 NW 162 Street
Seattle, Washington 98177
(206) 546-1936
Attorney for Monroe County

Certificate of Service

I hereby certify that a copy of the foregoing was served by U.S. Mail, postage pre-paid, first class, this 14th day of December, 1993, upon Paul J. Watts, Esq., 85 S. Main Street, Spencer, Indiana 47460-1787 and Charles Rosenberger, Esq., CSX Transportation, 500 Water Street, Jacksonville, Florida 32202.

s/ Charles H. Montange